RENDERED: SEPTEMBER 22, 2005
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

2003-SC-0744-MR
(2002-CA-0004)

WILLIAM BOWEN, JR. - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - *Appellee*

Appeal from Bullitt Circuit Court
Honorable Thomas Waller, Judge
2002-CR-0066

MEMORANDUM OPINION OF THE COURT
—AFFIRMING

Appellant, William E. Bowen, Jr., was convicted by a Bullitt County Circuit Court jury of first-degree sexual abuse and first-degree sodomy. Appellant waived jury sentencing and accepted the Commonwealth's recommended sentence of five years' imprisonment for the sexual abuse charge and twenty years' imprisonment for the sodomy charge, to be served concurrently. Appellant appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). He assigns the following trial court errors: (1) improper denial of a motion to suppress his taped statement to police, (2) failure to allow Appellant to play his taped statement to the jury during voir dire and during opening statements, (3) failure to grant a continuance to secure a new expert witness, (4) failure to grant a directed verdict in his favor, and (5) improper denial of his motion to introduce a posed photograph into evidence. For the reasons set forth herein, we affirm.

Facts

Appellant worked second-shift as a paint mixer while his wife, Myrtle, ran a daycare business out of their home. One of the children, J.S., was cared for by Myrtle from age two until age twelve. In fact, J.S. continuously visited the Bowen home even after the formal childcare agreement was terminated; her last visit occurred in December of 2001. Some three months later in March of 2002, Trooper Jonathan Tapp of the Kentucky State Police interviewed J.S. concerning allegations of sexual abuse she had made to her mother. The interview occurred at the offices of the Cabinet for Families and Children, with Mary Ellen Murray, a social worker, present. At the conclusion of the interview, J.S. executed a handwritten statement in which she wrote that Mr. Bowen masturbated on her stomach. She did not mention any other inappropriate acts in the handwritten statement.

Later the same day, Trooper Tapp and Ms. Murray went to the Bowen home to interview Appellant. According to Trooper Tapp's time log, they were at the Bowen home for about two hours. Trooper Tapp and Appellant, however, present substantially different accounts of the meeting. According to Appellant, a brief tour of the home was followed by a high-pressure interrogation session. Trooper Tapp, however, denies that he conducted an interrogation and described the visit as an informal questioning. At any rate, the meeting ended after Appellant gave a ten minute taped statement in which he answered questions posed to him by Tapp. Trooper Tapp testified that he informed Appellant prior to taking the statement that he was not in custody and that he was free to refuse to answer any questions, though Tapp did advise Appellant of his rights at the outset of the recorded statement. Prior to trial, Appellant moved to suppress the taped statement; the motion was denied.

At trial, J.S. testified that Appellant sexually molested her in several ways. First, she alleged that when she was five years old Appellant came into his son's bedroom where

J.S. was napping, masturbated in her presence, and ejaculated on her stomach. She further testified that Appellant kept sexually explicit magazines in that bedroom. Second, she related an incident that occurred when she was six or seven years old. J.S. stated that while she was playing under the kitchen table with a dog, Appellant forced her to perform oral sodomy. She recounted that he was wearing a pair of green shorts at the time. Third, J.S. testified that Appellant occasionally would make her leave the door open when she used the restroom. Fourth, J.S. recounted a story told to her by Appellant that a nine-year-old girl offered to have sex with him. Fifth, J.S. testified that Appellant would frequently touch her buttocks while sitting on the couch.

Appellant testified and denied each of J.S.'s allegations, except for telling J.S. about the young girl who offered to have sex with him. He admitted to occasionally masturbating in his son's room, but emphasized that the only did so when he believed he was alone. In addition to Appellant's denial, he presented numerous witnesses to testify on his behalf. Most of these witnesses were the parents of children who had been cared for by Appellant's wife and testified that they had never seen or suspected any impropriety in the home.

The jury found Appellant guilty of both the sexual abuse charge and the sodomy charge. Appellant waived jury sentencing and was sentenced to five years imprisonment for the sexual abuse charge and twenty years' imprisonment for the sodomy charge, to be served concurrently. This appeal followed.

Motion to Suppress

Appellant argues that the trial court erred in admitting his taped statement. Prior to trial, defense counsel moved to suppress the statement, arguing that it lacked relevancy or, in the alternative, that any probative value was outweighed by its inflammatory effect. Following a hearing, the motion was denied. A renewed motion was also denied. On appeal, Appellant claims the statement is irrelevant because it reveals only his proclivity for mastur-

bation, which does not tend to prove an element of the crimes charged. Appellant also asserts that the statement lacked "time relevance"; that is, there is no evidence that Appellant's taped statements refer to the time of the alleged offenses. Finally, Appellant argues that, regardless of any potential relevancy, the taped statement nonetheless fails the probative versus prejudice balancing test required by KRE 403.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. This Court has elaborated: "To show that evidence is relevant, only a slight increase in probability must be shown." Blair v. Commonwealth, 144 S.W.3d 801, 808 (Ky. 2004). Moreover, the decision whether to admit or exclude evidence is left to the sound discretion of the trial court, and will not be reversed absent a showing of an abuse of that discretion. Simpson v. Commonwealth, 889 S.W.2d 781, 783 (Ky. 1994).

Upon review of the record, we conclude that Appellant's taped statement contained information probative of the crimes charged and therefore was properly admitted. The allegation underlying the sexual abuse charge was that Appellant had masturbated and ejaculated on J.S. while she was napping in his son's room. During

the taped interview, Appellant discusses his proclivity for masturbation, his practice of masturbating in his son's room, and J.S.'s habit of napping in that same room. In fact, when asked by Trooper Tapp if it was possible that he had unknowingly masturbated while J.S. was napping in the room, Appellant admits that it was "very possible." Moreover, Appellant's admission that he stored his pornographic materials in his son's room corroborated a portion of J.S.'s statements to Trooper Tapp, in which she identifies the son's bedroom as where Appellant kept pornographic magazines. Due to the nature of the allegations against Appellant, the taped statement - in which he ad-

mits an ongoing practice of masturbating in the same room where J.S. claims he ejaculated on her - more than satisfies the minimal threshold of relevancy.

Furthermore, we are not persuaded by Appellant's claim that the statement lacked "time relevance." Appellant argues that he gave the statements to Trooper Tapp under the belief that Trooper Tapp was referring to J.S.'s most recent visit to his home, in December of 2001. According to Appellant, statements concerning acts that occurred seven to ten years after the alleged crimes lack probative value.

Appellant accurately notes that the taped statement itself contains no reference to the date when the crimes allegedly occurred, nor does Appellant specify whether he was answering questions about acts that had occurred recently or several years prior. However, Appellant fails to recognize that the taped statement also does not conclusively rule out the possibility that he was discussing his personal practices at the time the abuse allegedly occurred. Thus, because the jury could have reasonably concluded that Appellant was discussing the past, the statement is probative of the sexual abuse charge. Furthermore, during the suppression hearing, Trooper Tapp was specifically questioned on this "point and noted that, prior to taking the statement, Appellant said that he masturbated in the bedroom "all the time" and during "the same time that [J.S.] was napping in there." In light of this testimony and the varying conclusions that could legitimately be drawn from Appellant's statements, it cannot be said that the trial court abused its discretion in admitting the statement for the jury's consideration. The alleged "defect" of which Appellant complains - the lack of a defined time frame to his admissions - relates more to the weight of the evidence, not its admissibility. See Sawhill v. Commonwealth, 660 S.W.2d 3, 5 (Ky. 1983).

Alternatively, Appellant asserts that the taped statement should have been suppressed because any probative value was outweighed by its prejudicial effect. KRS 403 provides that otherwise relevant evidence may be excluded

if "its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues or misleading the jury." We recognize that evidence of masturbating or other sexual preferences is highly personal, and may at times be unduly prejudicial. See e.g. Chumbler v. Commonwealth, 905 S.W.2d 488 (Ky. 1995). However, KRE 403 requires that we consider, the prejudicial effect of such information weighed against the probative value of the evidence. We reiterate that the sexual abuse charge alleged that Appellant masturbated in front of and ejaculated on J.S. Considering the circumstances, it is not unreasonable to question Appellant about masturbation, and whether he masturbated in his son's bedroom, as J.S. alleged. Prejudice is that which is unreasonable and unnecessary. Partin v. Commonwealth, 918 S.W.2d 219, 223 (Ky. 1996). Accordingly, we find that the taped statement was sufficiently probative of the crimes charged, and was permissible pursuant to both KRE 401 and KRE 403.

Finally, Appellant argues that his statement is inadmissible under KRE 404(b), which prohibits "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show conformity therewith." We disagree. The Commonwealth did not admit Appellant's taped statement as evidence of his habit of masturbating, in order to show action in conformity with that habit. Rather, the Commonwealth admitted Appellant's statements as a qualified confession to the allegations.

The decision whether to admit or exclude evidence is left to the sound discretion of the trial court. Simpson v. Commonwealth, 889 S.W.2d 781, 783 (Ky. 1994). We will not reverse its decision absent proof on the record that the trial court abused its discretion. Id. An abuse of discretion is not merely an error of law or judgment, but is an unreasonable exercise of arbitrary or biased judgment. Id. The facts of this case do not demonstrate such an error.

Voir Dire and Opening Statements

Appellant next argues that the trial court erred in prohibiting him from playing his taped statement to prospec-

tive jurors during voir dire. Appellant sought to play the tape, to determine if any juror would find Appellant guilty based on the taped statement even though it did not contain an express admission of guilt. He also believed that playing the tape prior to trial would lessen its prejudicial impact. Additionally, Appellant claims he was prejudiced by the trial court's refusal to allow him to play the tape during his opening statement.

The trial court has broad discretion in overseeing voir dire. Woodall v. Commonwealth, 63 S.W.3d 104,118 (Ky. 2001). The purpose of voir dire is to determine whether a juror's mind is initially free from bias. Shegog v. Commonwealth, 142 S.W.3d 101, 110 (Ky. 2004). It is not a proper function of voir dire, however, to have jurors indicate in advance or commit themselves to certain ideas and views before examining the evidence. Woodall, 63 S.W.3d at 116. In seeking to play the tape to the jury, Appellant attempted to secure improper commitments from jurors. We note that Appellant does not argue that he otherwise was precluded from asking questions of the panel or from exercising challenges against jurors who might have been biased against his case. There was no error.

Likewise, the purpose of an opening statement is to explain to the jurors the issues they will encounter so that they may understand the evidence as it is introduced. Brummitt v. Commonwealth, 357 S.W.2d 37, 41 (Ky. 1962) (quoting Lickliter v. Commonwealth, 60 S.W.2d 355 (Ky. 1933)); RCr 9.42. Appellant's admitted goal in playing the taped statement - to diminish its prejudicial effect - exceeded this purpose. Furthermore, Appellant's recorded statement amounts to testimony, and this Court has previously determined that a witness's prerecorded testimony cannot be played during opening statements. Fields v. Commonwealth, 12 S.W.3d 275, 281 (Ky. 2000). There was no error.

Motion for Continuance

Appellant next argues that the trial court erred in denying his motion for continuance. Appellant had retained

Dr. Richard A. Gardner to testify that Appellant does not exhibit any psychological signs of pedophilia. Additionally, Dr. Gardner would testify that masturbation is not a deviate sexual behavior indicative of any inclination to commit a criminal sexual offense. The trial court scheduled a Daubert hearing on the morning of trial, May 27, 2003, to determine the admissibility of Dr. Gardner's testimony.

Unfortunately, Dr. Gardner became extremely ill in the days leading up to the trial and died on May 25, 2003. Appellant's counsel did not know of Dr. Gardner's death when he appeared in court on May 27 for the Daubert hearing. He had been made aware the previous day, however, that Dr. Gardner's illness prevented him from testifying that day and accordingly moved for a continuance. To this motion, Appellant's counsel attached an affidavit outlining Dr. Gardner's proposed testimony. During a court recess, Appellant's counsel learned that Dr. Gardner had passed away. Defense counsel renewed the motion for a continuance to allow him to secure another expert who would offer similar testimony. The court held a hearing on Appellant's motion and ultimately refused to grant a continuance. Appellant now argues that failure to grant his motion for continuance denied him his constitutional right to present evidence to refute the charges against him. Ky. Const. § 11, U.S. Const., Amends. VI, XIV. He also argues that the court erred in not holding a Daubert hearing on the admissibility of Dr. Gardner's testimony. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786,125 L. Ed. 2d 469 (1993). We disagree.

At the outset, we determine that a Daubert hearing was held despite Appellant's arguments to the contrary. In fact, the trial judge unequivocally indicated when the hearing commenced: "We are going to proceed with the Daubert hearing on the Commonwealth's testimony and be subject to cross examination by the defense." The trial court then reviewed Dr. Gardner's lengthy affidavit, outlining his proposed testimony, Dr. Gardner's lengthy report, and controlling case law. In essence, Dr. Gardner's proposed testi-

mony was that Appellant did not manifest the signs of pedophilia and therefore was unlikely to have committed the crime. Relying especially on this Court's decision in Tungate v. Commonwealth, 901 S.W.2d 41 (Ky. 1995), the trial court concluded that Dr. Gardner's testimony was inadmissible because it lacked a scientific basis, and because testimony as to whether Appellant was a pedophile was not relevant to the question of his guilt of the crimes charged.

A trial court has "wide latitude in deciding how to test an expert's reliability and in deciding whether or when special briefing or other proceedings . . . is needed to investigate reliability." Dixon v. Commonwealth, 149 S.W.3d 426, 430 (Ky. 2004) (emphasis in original). The court may rule on the admissibility of the expert's testimony when the trial record is "complete enough to measure the proffered testimony against the proper standards of reliability and relevance." Commonwealth v. Christie, 98 S.W.3d 485, 488 (Ky. 2002) (quoting Jahn v. Equine Services P.S.C., 233 F.3d 382, 393 (6th Cir. 2000)). Usually, such a record will consist of "proposed expert's reports, affidavits, deposition testimony, existing precedent, and the like." Christie, 98 S.W.3d at 488-89.

In this case, the trial court had a sufficient record before it to conduct a Daubert hearing and rule on the admissibility of Dr. Gardner's testimony. As is recommended in Christie, the court examined an affidavit containing Dr. Gardner's proposed testimony, considered Dr. Gardner's lengthy report, and looked to existing precedent in Tungate v. Commonwealth, 901 S.W.2d 41 (Ky. 1995). In Tungate, the trial court considered the admissibility of testimony by the very same Dr. Gardner that the defendant was unlikely to have committed a sexual crime against a minor because he did not have the psychological profile of a pedophile. The court rejected this testimony because such propensity testimony is an impermissible comment on a defendant's guilt or innocence. Id. at 43. Additionally, the court found that Dr. Gardner's testimony lacked a scien-

tific basis. Id. The trial judge in the present case was well aware of Tunqate and its implications as he considered the admissibility of Dr. Gardner's testimony. From the substantial record before it, we believe that the trial court had sufficient evidence to conduct a Daubert hearing.

This Court has previously indicated that delays in trial should only be granted when "purposeful." Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991), overruled on other grounds in Lawson v. Commonwealth, 53 S.W.3d 534 (Ky. 2001). Granting a continuance to allow Appellant to secure a new expert witness who would proffer similar testimony was unnecessary because Dr. Gardner's testimony was not admissible. The decision to continue a trial rests in the sole discretion of the trial judge. RCr 9.04, Williams v. Commonwealth, 644 S.W.2d 335 (Ky. 1982). We find no error. Motion for Directed Verdict

Appellant next argues that the trial court erred in denying his motion for a directed verdict at the close of the Commonwealth's case, and at the close of all evidence. He claims that J.S.'s testimony, which constituted the bulk of the evidence against him, was not credible enough to prove his guilt beyond a reasonable doubt.

Appellant acknowledges that simple discrepancies and changes regarding minor details of a child victim's testimony are matters of credibility to be assessed by the jury. Appellant, however, argues that the quality and quantity of inconsistencies in J.S.'s testimony rendered it completely incredible and insufficient to support a verdict of guilt. We have reviewed J.S.'s testimony and examined the numerous portions to which Appellant directs our attention. Without detailing every citation of inconsistency, it is sufficient to state that J.S. gave testimony that conflicted with her prior statements to Trooper Tapp and Ms. Murray, and that her testimony on the second day of trial conflicted somewhat from her prior day's testimony.

In reviewing the denial of a motion for directed verdict, we must determine if "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. Only

then is the defendant entitled to a directed verdict of acquittal." Commonwealth v. Benham, 816 S.W.2d 186,187 (Ky. 1991). A rational trier of fact could have believed, based on J.S.'s testimony, that Appellant had committed first-degree sexual abuse and first-degree sodomy, as J.S. unequivocally identified Appellant as the perpetrator. In cases where the parties essentially engage in a "swearing match "it is the jury's responsibility to evaluate the credibility of the witnesses and give due weight to their testimonies. Cobb v. Commonwealth, 105 S.W.3d 455, 458 (2003). Ultimately, it is the jury's responsibility to evaluate the evidence before it and reach a verdict based on that evidence. Morton v. Commonwealth, 817 S.W.2d 218 (Ky. 1991). Because the jury had sufficient evidence to find Appellant guilty of the crimes charged beyond a reasonable doubt, the trial court did not err in denying Appellant's motion for directed verdict.

Introduction of Posed Photograph

Appellant's final argument is that the trial court erred in precluding him from introducing a posed photograph of him seated at a kitchen table where the alleged sodomy took place. Appellant wanted to introduce this photograph to show that the design of the table made it impossible for the sodomy to have occurred as alleged by J.S. Appellant admits that it is not the same table under which the act allegedly occurred, but claims its design is the same. The court refused to allow the introduction of the photograph, noting that it was not "the exact same table."

We last considered the issue of posed photographs in Gorman v. Hunt, 19 S.W.3d 662 (Ky. 2000). The defendant in Gorman attempted to introduce a posed photograph purporting to reconstruct an automobile accident. Id. at 665. In holding that posed photographs may sometimes be admissible, we encouraged trial courts to carefully scrutinize posed photographs to prevent deception and misrepresentation. Id. at 669. The trial court holds broad discretion, in accepting or rejecting posed photographs. Id. at 667. Its decision will not be disturbed on appeal absent a clear

showing of abuse of discretion. Id. Especially in light of Appellant's admission that the picture was of a different table, the trial court did not abuse its discretion by prohibiting introduction of the photograph.

For the foregoing reasons, the judgment of the Bullitt Circuit Court is affirmed. All concur.

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ORDER DENYING PETITION FOR REHEARING

The petition for rehearing filed by appellant, William E. Bowen, Jr., is hereby DENIED.

All concur.

Entered: December 22, 2005.

/s/ [illegible]
Chief Justice